October 7, 1985

The Honorable Sam Nunn
303 Senate Dirksen Office Building
Washington, D. C. 20510

Dear Senator Nunn:

SEARCH Group, Inc. ("SEARCH") appreciates this opportunity to provide you with its comments concerning the Security Clearance Information Act of 1985 ("Security Clearance Act"). The Security Clearance Act would require state and local criminal justice agencies to make available, upon request, criminal history record information to the Department of Defense ("Defense Department"), the Office of Personnel Management ("OPM") and the Central Intelligence Agency ("CIA"), regarding individuals under investigation for access to classified information, assignment or retention in sensitive national security duties, or acceptance or retention in the armed services.

SEARCH's Background and Position Regarding Federal Access

SEARCH is a national organization operated by state criminal justice agencies to represent their interests in matters affecting criminal justice information systems, information policy and statistical programs. SEARCH is governed by a membership group consisting of governor-appointed, senior officials from all fifty states and the United States territories. Many of these officials are directly or indirectly responsible for the operation of their states' criminal history record repositories. (The latest issue of SEARCH's news magazine is at Tab No. 1).

Accordingly, SEARCH's members have a deep and direct interest in the matters addressed by the Security Clearance Act. (A summary and copies of state comments about the Security Clearance Act is at Tab No. 2). Over the last ten years SEARCH has given considerable attention to these matters. For instance, in 1975 SEARCH published detailed model standards for access by federal agencies to state criminal history record information for security clearance and personnel suitability determinations. As a further example, in March of 1979 SEARCH submitted a report to the Defense Department entitled, "Federal Access to State and Local Criminal Justice Information for Federal Personnel Security and Employment Suitability Determinations." That report set forth in detail state law and practice regarding federal access to state-held criminal history record information and included model standards.

Since at least 1975 SEARCH has been on record as supporting the principle of federal access to state and local criminal history record information for security clearance and personnel suitability determinations. SEARCH continues to support this principle.

Role of State Policy and Law

The Security Clearance Act presents a painful issue for SEARCH. As noted above, SEARCH supports the goal of the legislation and for that reason and with the adoption of the specific changes which we recommend below, SEARCH does not oppose the legislation. However, we cannot help but express regret that federal legislation -- rather than state law -- is the vehicle to reach an otherwise laudable goal. As a matter of both logic and history, and perhaps the Constitution, state and local criminal history record information is properly regulated by state law. These records relate to violations of state law; these records are created and maintained pursuant to state law; and these records are created and maintained at state expense.

Over the last 15 years every state has adopted legislation regulating the collection, maintenance or dissemination of criminal history record information. Under the law in most states the Defense Department, OPM and the CIA are not considered to be criminal justice agencies for the simple reason that those agencies have few, if any, criminal justice responsibilities. Nevertheless, legislatures in most states have chosen to open their criminal history records to these federal agencies for security clearance and personnel suitability determinations. Legislatures in some states have chosen to place restrictions on such federal access. (Several tables describing state law and practice are at Tab No. 3). However, the clear trend is toward opening records for federal access, and in just the last few years many state legislatures have amended their laws to provide access to federal agencies.

Moreover, the FBI and its state-based Advisory Policy Board are currently testing a national system for the interstate exchange of criminal history record information. The system, called the Interstate Identification Index ("III"), works as a federally-based index which points authorized requestors to the state repository maintaining responsive criminal history records. As part of this testing process, the FBI has commissioned studies to consider access to III for noncriminal justice purposes, such as federal security clearance and personnel suitability determinations. The result of these studies may be to permit III to be used to respond to personnel security requests. Thus, there is good reason to believe that whatever problems federal agencies may have experienced concerning access to state and local records for personnel security purposes, those problems are already being corrected by developments in state law and the III.

With this in mind, we cannot help but regret that in a single stroke the Security Clearance Act would wipe out the literally thousands of hours of effort expended over nearly two decades by state legislators and criminal justice officials in all 50 states. Our regret is underlined by the Congress' failure to even hold hearings on this legislation. Consequently, there is no record on which the Defense Department and other federal agencies have demonstrated the extent and nature of their difficulties in obtaining state and local criminal history record information or the nexus between those difficulties and national security interests. We hope that it is therefore understandable that SEARCH and the state criminal justice information community which it represents are uncomfortable with this legislation and the precedent which it represents -- that federal legislation rather than state law would mandate disclosure policy for state criminal justice records.

Proposed Amendments to Security Clearance Act

Notwithstanding these concerns, SEARCH is prepared to give the benefit of the doubt to the federal personnel security agencies which assert that for national security reasons this legislation is necessary. Accordingly, SEARCH does not oppose the adoption of the Security Clearance Act, provided that the following changes are made.

--No mandatory access for investigations relating to acceptance or retention in the Armed Services. As presently drafted, the Security Clearance Act would require state and local agencies to release criminal history record information to the Defense Department, OPM and the CIA for investigations for eligibility for: (1) access to classified information; (2) assignment or retention in sensitive national security duties; and (3) acceptance or retention in the armed services. SEARCH urges the Congress to delete "acceptance or retention in the armed services" as a basis for mandatory release.

Three considerations support this recommendation. First, the Defense Department, to our knowledge, has not demonstrated a nexus between the need for criminal history record checks for all members of the armed services and national security interests. SEARCH appreciates that many members of the armed services are in positions which require security clearances or which otherwise involve sensitive national security duties, and SEARCH supports the Defense Department's access to criminal history records for investigations relating to members of the armed services who are in such positions. However, it is our understanding that many members of the armed services do not hold security clearances, and are not otherwise in positions involving sensitive national security duties. Absent a clear showing of need, we do

not believe that state and local agencies should be burdened with federally-imposed record processing requirements or that record subjects should be exposed to the privacy and due process risks attendant to those checks.

Second, we fear that the number of mandatory record checks ordered by the armed services may be so great that it will place a crushing burden upon state and local criminal justice agencies.

Third, most of the individuals who would be the subject of armed services record checks are very young men and women who are unlikely to have compiled a criminal history record. Rather, to the extent that these individuals have records, those records are much more likely to be juvenile justice records. Therefore, the likely result of compelling criminal record checks for armed service recruits will simply be the expenditure of great effort to process hundreds of thousands of criminal history record checks which fail to produce relevant records.

No doubt for all of these reasons, many states which willingly provide access to criminal history record information for security clearance and personnel suitability determinations do not provide access for recruiting determinations. (See Tab No. 3).

--Payment of Fees. The Security Clearance Act provides that "fees charged for providing criminal history information pursuant to this subsection shall not exceed those charged to other criminal justice agencies for such information." This formulation would prohibit virtually all criminal justice agencies from charging fees for criminal history record checks under this Act. We know of no state or local criminal justice agency which charges other criminal justice agencies for record checks. Criminal justice agencies have a reciprocal relationship whereby criminal justice agencies process other criminal justice agency record checks on a courtesy basis. No such reciprocity can exist between state and local criminal justice agencies and the Defense Department, OPM or the CIA for the simple reason that these federal agencies ordinarily do not have information which they can provide to criminal justice agencies on a reciprocal, courtesy basis. States must be able to charge fees to noncriminal justice agencies in order to recoup their costs. Naturally, these costs vary from state to state but in virtually all jurisdictions the cost of processing a criminal history record check can be significant. For that reason, those states which process noncriminal justice requests generally charge a fee. (A description of state fee requirements is at Tab No. 4). Accordingly, we urge the Congress to amend this section to provide that fees

charged for processing criminal history record checks pursuant to the Security Clearance Act shall not exceed those charged to noncriminal justice agencies for such information.

--Fingerprint Submissions. The Security Clearance Act should be changed to require that requests by the Defense Department, OPM or the CIA for criminal history record information be accompanied by the fingerprints of the record subject. Many state agencies now require that noncriminal justice requestors submit fingerprints along with the name of the individual who is the subject of the record check. If the processing agency obtains the fingerprints of a record subject that agency is far better able to locate criminal history record information about the record subject and far better able to ensure that the criminal history records which are released do, in fact, relate to the subject of the record check. Indeed, the only method available to ensure that the record subject is positively identified is through a fingerprint check. In instances where record subjects use aliases, for example, the only positive method to discover this misrepresentation is through a fingerprint check. Thus, submitting fingerprints benefits both the requesting agency and the processing agency, and also serves important societal interests in privacy and the appropriate management of government records.

--A Hold Harmless from Liability. SEARCH urges the Congress to amend the Security Clearance Act to require, upon request, that federal agencies undertake to hold state and local agencies harmless from liability in the event that criminal history record information which the agency discloses to the federal agency is used by the federal agency resulting in liability to the state or local agency. Some criminal history record information maintained in state and local agencies is inaccurate or incomplete -- often because the information lacks a current disposition. Under current law in many states agencies cannot release criminal history record information which lacks a disposition. Under the Security Clearance Act state and local agencies will be forced to release incomplete information. If these records are subsequently used by the federal agency to make an adverse determination about an individual, or if the information is otherwise handled by the federal agency in a manner that results in harm to the record subject, the record subject may have a cause of action against the state or local agency. In this event, it is only fair that the federal agency whose request triggered the compulsory disclosure of the incomplete or inaccurate information and whose subsequent use of the information led to the liability, should assume such liability.

--Statutory Sealing Provisions. The Security Clearance Act defines criminal history record information to exclude, "records sealed pursuant to a lawful order of a court of law." Statutes in many states permit the administrative sealing of criminal history record information in certain situations. For example, sealing provisions have been adopted in many states which automatically and administratively seal a criminal history record if the record subject has established a clean record (no involvement with the criminal justice system) for 15 years. As now written, the Security Clearance Act would recognize court-ordered sealing but reject automatic, statutory sealing. SEARCH believes that if a state makes a determination that a criminal history record should be sealed and thus unavailable for criminal justice purposes, federal law should respect that judgment and permit the withholding of this record under the Security Clearance Act.

--Redisclosure by Federal Agencies. The Security Clearance Act prohibits the redisclosure of criminal history record information received under the Act, except for purposes set forth in the Act or as provided by the Privacy Act of 1974. SEARCH urges the Congress to limit disclosure of criminal history record information obtained under the Security Clearance Act to the purposes set forth in the Act. Disclosures under the Privacy Act can include disclosures for routine uses and for a variety of other purposes unrelated to national security concerns. Many states have adopted an express public policy against the disclosure of criminal history record information except in specific and narrow circumstances. Thus, permitting disclosures under the Privacy Act would be inconsistent with the public policy of these states.

--Definition of Criminal History Record Information. The Security Clearance Act defines criminal history record information to mean information consisting of notations of arrests, detentions, indictments, or other formal criminal charges or any disposition arising therefrom collected by a criminal justice agency. Theoretically, this definition is sufficiently broad to permit federal agencies to require criminal justice agencies to review investigative and intelligence files, locate criminal history record information within those files, and release that criminal history record information. We do not believe that the Congress intends to make investigative and intelligence files subject to requests under this Act. Accordingly, we recommend that the Congress change the term "criminal history record information" to "criminal history record".

--Congressional Findings and Policies. Finally, SEARCH takes exception to the following statement which is contained in the "Congressional Findings and Policies" section of the Security Clearance Act:

> That the interests of national security have been adversely affected by the reluctance and refusal of some State and local criminal justice agencies to provide criminal history record information to the Department of Defense, the Office of Personnel Management or the Central Intelligence Agency . . .

This "finding" implies a lack of sensitivity to national security concerns on the part of the nation's criminal justice information community. The men and women who serve as peace officers and other criminal justice officials are surely among the nation's most patriotic citizens. Furthermore, as noted above, we see nothing in the record of the Congress' consideration of this legislation to indicate that there has, in fact, been any showing of the extent to which state and local criminal justice agencies fail to make criminal history record information available to federal agencies for security clearance and personnel suitability determinations or the nexus between these putative failures and the nation's security. Accordingly, on behalf of the tens of thousands of men and women who serve the nation as peace officers and criminal justice officials, we request that the Congress delete this unfortunate remark from the Security Clearance Act.

SEARCH appreciates the opportunity to express its views concerning the Security Clearance Act. Please do not hesitate to contact us if we can provide the Congress with any additional information.

Sincerely,

Gary D. McAlvey

Gary D. McAlvey
Chairman

MEMORANDUM FOR:

Received from HPSCI - Text of letters sent by the House Judiciary week of 7 October 1985.

Date